Nos. 14,515, 14,501

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

No. 14515

IN RE THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

No. 14501

Notices of Motions
Motions to Dismiss or Affirm
Points and Authorities

ALLAN P. MATTHEW
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San Francisco 4, California
Of Counsel

Dated: October 5, 1954.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

No. 14515

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,
Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellee.

Notice of Motion to Dismiss the Appeals or Affirm the Judgment

---

To appellants, The Western Pacific Railroad Corporation and Alexis I. duPont Bayard, Receiver, and to Leroy R. Goodrich, Esq., their attorney:

PLEASE TAKE NOTICE that The Western Pacific Railroad Company, the appellee herein, will present to the above entitled Court its motion to dismiss the appeals or affirm the judgment herein on Monday, October 18, 1954, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above entitled Court in the United States Post Office and Court House

Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14515

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THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,
Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellee.

Motion to Dismiss the Appeals or Affirm the Judgment

Comes now appellee and moves to dismiss the appeal from ne judgment below in favor of appellee or, in the alternative, o affirm that judgment, on the grounds that:

(a) This appeal is frivolous and presents no substantial question;

(b) This appeal is a contempt of court; and

(c) This appellate proceeding has been, and unless it is dismissed will continue to be, used by appellants for improper purposes of vexation and harassment.

Appellee moves to dismiss the appeal from the order of the District Court granting appellee's motion for summary judgment n the ground that:

(a) The order appealed from is an interlocutory non-appealable order.

This motion is based upon the attached affidavit of F. B. Whitman and memorandum of points and authorities and upon the records now on file in this Court.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14515

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,*

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*

Affidavit of F. B. Whitman

State of California
City and County of San Francisco—ss.

F. B. WHITMAN, being duly sworn, deposes and says:

1. I am the president of The Western Pacific Railroad Company, the appellee herein.

2. During the month of September 1954 The Western Pacific Company had in process a refinancing program pursuant to which the preferred stock of the company was in part to be called, with payment for the stock so called to be made in cash, and in part to be exchanged for income bonds. In compliance with applicable provisions of the Interstate Commerce Act The Western Pacific Railroad Company filed its application with the Interstate Commerce Commission for approval of this refinancing program and particularly for authority to issue and sell income bonds. On September 16, 1954, when the said application was pending before

the Interstate Commerce Commission and undetermined, I received from Alexis I. duPont Bayard, Receiver of The Western Pacific Railroad Corporation, a letter dated September 14, 1954. A true, full and correct copy of that letter is attached to this affidavit as Exhibit A.

3. I am informed and believe, and therefore allege, that a copy of that letter was sent by said Bayard to the Chairman of Division Four and to the Director of the Bureau of Finance of the Interstate Commerce Commission, and was received by them on or about September 16, 1954.

F. B. WHITMAN
F. B. Whitman

Subscribed and sworn to before me
this 5th day of October, 1954.

BERTHA P. LARSON
Notary Public
in and for the City and County
of San Francisco.
My commission expires Jan. 20, 1957.
[Notarial Seal]

EXHIBIT A

Alexis I. duPont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclosing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you

the Interstate Commerce Commission and undetermined, I received from Alexis I. duPont Bayard, Receiver of The Western Pacific Railroad Corporation, a letter dated September 14, 1954. A true, full and correct copy of that letter is attached to this affidavit as Exhibit A.

3. I am informed and believe, and therefore allege, that a copy of that letter was sent by said Bayard to the Chairman of Division Four and to the Director of the Bureau of Finance of the Interstate Commerce Commission, and was received by them on or about September 16, 1954.

F. B. WHITMAN
F. B. Whitman

Subscribed and sworn to before me
this 5th day of October, 1954.

BERTHA P. LARSON
Notary Public
in and for the City and County
of San Francisco.
My commission expires Jan. 20, 1957.
[Notarial Seal]

EXHIBIT A

Alexis I. duPont Bayard
Star Building
Wilmington, Delaware

September 14, 1954

F. B. Whitman, Esquire
President
Western Pacific Railroad Company
San Francisco, California

Dear Sir:

This refers to your circular dated September 8, 1954 addressed to the holders of your company's Participating Preferred Stock. This circular embodies an offer stated to have been approved by your company's Board of Directors to exchange up to 225,000 shares of such stock for Debenture Bonds and Common Stock and representing that non-assenting stock together with 83,211 additional shares specified for redemption, will be redeemed at par plus accrued and unpaid dividends by use of your company's available cash.

Whether the lawyers representing Western Pacific Railroad Company should have permitted an exchange offer to be set in motion during the pendency of our appeals to the Court of Appeals involving the availability for use by your Company of any part of the $17,201,739 in your custody which, I contend, is impressed with in trust for other purposes, raises question as to which I express or imply no opinion.

But, since you are soliciting assents of your Participating Preferred Stockholders without disclosing the pendency of these appeals, which, if successful, will reduce your unappropriated surplus, represented to be $53,902,739 at June 30, 1954, to less than $36,700,500 and may so impair your cash position that you

will be unable to redeem the shares which it will be necessary to redeem, I respectfully suggest that your circular is fatally defective in withholding from your Preferred Stockholders full and correct information respecting the pending appeals.

Even if the Interstate Commerce Commission should approve the proposed exchange and authorize the new securities the transaction may well be invalidated by the Courts.

Accordingly we are sending a copy of this letter to the Chairman of Division 4 and to the Director of the Bureau of Finance of the Interstate Commerce Commission, with the suggestion that the applications for Interstate Commerce Commission approval be dismissed for deficiencies in this circular of September 8, 1954, or that the applications be held in abeyance pending the determination of the appeals now on the Docket of the Court of Appeals for the Ninth Circuit.

May I ask that you bring this letter to the attention of Blyth & Company, Inc. and Union Securities Corporation, the underwriters.

Yours very truly,

ALEXIS I. DUP. BAYARD
Alexis I. duP. Bayard
Receiver of Western Pacific Railroad Corporation

AIduPB:DeH

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,* vs. THE WESTERN PACIFIC RAILROAD COMPANY, Appellee.	No. 14515
IN RE THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	
THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver, *Appellants,* THE WESTERN PACIFIC RAILROAD COMPANY, *Appellee.*	No. 14501

Memorandum of Points and Authorities in Support of Motions to Dismiss Appeals or to Affirm Judgment

This litigation is an effort by appellants to accomplish two objectives, neither of which is possible of attainment, and each of which presents a grave affront to the judicial process. By their amended bill of complaint herein the appellants seek, *first,* to realize upon a claim for an indebtedness declared worthless and ordered cancelled and discharged in the Western Pacific reorganization proceeding which terminated on March 28, 1946. By the final decree in the reorganization proceeding this claim was not only

"cancelled and discharged" but the institution of suit to recover upon it was expressly enjoined. *Second,* appellants are in effect seeking a reversal of the judgment entered against appellants by the United States District Court on January 13, 1950, in what has been termed the "tax savings" suit, (see references to this suit in amended bill of complaint, R. in No. 14515, pp. 25 et seq.). This judgment, that "plaintiffs" (appellants herein) "be denied all relief" and should "recover nothing", was affirmed by this Court on October 29, 1951, and this Court for the second time denied petitions for rehearing on August 20, 1953. Upon denial of certiorari by the Supreme Court of the United States on December 7, 1953, this judgment became final. Appellants now propose to "implement" that judgment so that, instead of providing that appellants shall "recover nothing", it will provide that appellants recover many millions of dollars out of income of Western Pacific Railroad Reorganization Trustees in satisfaction of a claim admittedly "dead". This attempted renewal of litigation is, (1), in contempt of the final decree of the bankruptcy court in the Western Pacific reorganization proceeding and, (2), upon familiar principles of *res judicata,* is precluded by the final judgment in the "tax savings" suit.*

Upon the filing of the bill of complaint herein the appellee moved for summary judgment and also filed its petition in the

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*In the course of the proceedings in the United States District Court herein, counsel for appellants was under the necessity of admitting that "the original claim as a claim in bankruptcy is dead", and further that "We" (appellants) "can't sue on the claim" (R. in Nos. 14501-14515, p. 149). Notwithstanding these admissions appellants are attempting to justify their institution of suit upon a claim admittedly "dead". In the return of respondents (appellants) to the order of the District Court to show cause why they should not be adjudged guilty of contempt it was declared, in paragraph Second, that this alleged "successoral action" was brought to "implement" a determination of this Court "in an earlier and substantially identical action" brought by appellants (R. No. 14501, pp. 37-38). If it be true that these two actions are "substantially identical" it inevitably follows that the second action is barred by the final judgment entered in the first that appellants "recover nothing".

reorganization proceeding asking that appellants be adjudged guilty of contempt. The District Court, recognizing the frivolous nature of this action (No. 14515), granted appellee's motion for summary judgment, describing the proceeding as without "the slightest merit" (R. in Nos. 14515 and 14501, p. 152) and as "an affront to the judicial process" (R. in No. 14515 and No. 14501, p. 154). The court below also concluded that this suit was in contempt of the final decree in the reorganization proceeding (R. in No. 14501, p. 43).

The appeals to this Court are from the judgment below for appellee, the order granting appellee's motion for judgment and the contempt order. Two of these orders, the order granting the summary judgment motion (R. in No. 14515, p. 77) and the order holding appellants in contempt and directing further District Court proceedings in that connection (R. in No. 14501, p. 43), are plainly interlocutory and non-appealable. The appeal from the judgment for appellee is taken, of course, from a final judgment. But since that appeal raises no substantial question, since the appeal is itself contemptuous and since appellants are using this appellate proceeding for improper purposes of vexation and harassment, appellee feels warranted in asking that the appeal be dismissed or the judgment below affirmed forthwith.

There are good reasons for a prompt disposition of this litigation. Attached to the affidavit accompanying the motions is a letter dated September 14, 1954 addressed by appellant Bayard to appellee's president, F. B. Whitman. That letter refers to appellee's refinancing program whereby its preferred stock will be called in part and exchanged in part for income bonds. Appellants hold no preferred stock of appellee and have no conceivable interest in appellee's financial structure. Nevertheless, as the Bayard letter demonstrates, appellants, *relying upon the fact that these appeals are pending,* have undertaken to criticize the exchange proposal and to call for an I.C.C. hearing—all this in the hope, no doubt, that in order to be free of their interference appellee

would make some payment to them for their worthless claims. Appellee has no such intention; but since appellants are prepared to go to these lengths of harassment and vexation appellee believes it is justified in asking this Court to bring an end to this litigation immediately.

1. The Appeal from the Judgment Below for Appellee Presents No Substantial Question.

Prior to the Western Pacific reorganization, appellant, The Western Pacific Railroad Corporation, owned all the stock of and was an unsecured creditor of the pre-reorganization The Western Pacific Railroad Company. In the reorganization proceeding this unsecured debt, together with the stock interest, was determined to be worthless, ordered cancelled and all further efforts to realize upon it enjoined.[1] After the reorganization proceeding was closed the appellant Corporation filed suit against appellee claiming $17,201,739 of so-called tax savings. This suit terminated in a final judgment that appellants take nothing.[2]

The amended complaint in the present proceeding recites the pre-reorganization indebtedness of the pre-reorganization The Western Pacific Railroad Company to the appellant Corporation (R. in No. 14515, p. 25); quotes from the opinion of the District Court in the tax savings suit (R. in No. 14515, pp. 25-34); quotes from the opinion of this Court in that action as follows (R. in No. 14515, p. 38):

> "The Corporation was the sole owner of the subsidiary's (the debtor's) capital stock. As such it was under a duty to deal fairly with the subsidiary, having full regard for the

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[1]See *Western Pacific Railroad Company Reorganization,* 230 I.C.C. 61, 233 I.C.C. 409, 452; *In re Western Pacific R. Co.,* 34 F. Supp. 493 (N.D. Cal. 1940); *In re Western Pacific R. Co.,* 124 F.2d 136 (C.C.A. 9 1941); *Ecker v. Western Pacific R. Corp.,* 318 U.S. 448, 63 S. Ct. 692 (1943).

[2]*The Western Pacific Railroad Corporation, et al v. The Western Pacific Railroad Company,* 85 F. Supp. 868 (N.D. Cal. 1949), 197 F.2d 994, 1012 (C.A. 9 1951); 345 U.S. 247 (1953); 205 F.2d 374 and 206 F.2d 495 (C.A. 9 1953), cert. den. 346 U.S. 910.

> interests of the creditors and holders of other securities. *Consolidated Rock Products Co. v. Du Bois* (312 U.S. 510). It owed a duty not to require the subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its cooperation then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

leaps to the conclusion that by this language this Court has held that appellee holds $17,201,739 in trust for appellant and other pre-reorganization unsecured creditors (R. in No. 14515, pp. 38, 41); and asks that the court take custody of this fund and distribute it to appellant and the other unpaid creditors of the pre-reorganization company (R. in No. 14515, p. 43).

This is preposterous. The opinion of this Court on which appellants rely did not even intimate that appellee holds $17,201,739 in trust for appellants or anyone else. On the contrary, this Court ruled in unequivocal fashion that appellants had no claim against appellee and affirmed the judgment below that appellants take nothing (197 F.2d 994; 206 F.2d 495). In that tax savings suit the appellants applied to the court to have the so-called "tax savings" treated as a fund held by appellee for appellants' benefit, but this application was not granted. No such "fund" was recognized as having any existence, and by the court's final judgment appellants were denied all relief. Appellants are now engaged, therefore, in asking the Court to rule that its decision for appellee in the earlier proceeding was in truth a decision for appellants. Appellee submits that this is a frivolous undertaking.

Appellants represent that their complaint herein has been filed "as an independent or successoral action in equity" to provide a "machinery or medium" for "implementing" the judgment in the tax savings suit (R. in No. 14515, p. 41). But the judgment in the tax savings suit, affirmed without any change whatever by this Court, was that the appellants recover nothing, and yet appellants pro-

pose to "implement" that judgment by converting it into a judgment that appellants should now recover $17,201,739.

The reasons why the judgment below is plainly correct and this appeal, like the entire proceeding, plainly frivolous include the following:

(a) The only right appellants assert is the alleged right of the appellant Corporation as an unpaid unsecured creditor of the debtor Company in the Western Pacific reorganization proceeding (R. in No. 14515, pp. 39, 42). It is indisputable that the claim of the Corporation as creditor of the debtor in that proceeding was found valueless, cancelled and discharged. The Interstate Commerce Commission said (233 I.C.C. 452):

> "The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims."
>
> * * * * * * *
>
> "The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled." (233 I.C.C. 453)

The District Court, approving the I.C.C. plan, said (34 F. Supp. 498):

> "The unsecured claims of the Western Pacific Railroad Corporation and the Western Pacific Company, and other unsecured claims not entitled to priority over existing mortgage, are found by the Commission to be without value and not entitled to participate in the distribution of cash or securities of the reorganized company."

The Supreme Court, affirming the District Court order approving the plan, said (318 U.S. 488):

> "* * * The secured claim of A. C. James Company could not be satisfied in full even with the more liberal valuation

of the common stock. Claims of lesser dignity were eliminated."

The order of November 7, 1944 revesting the railroad properties in the reorganized company provides in part:

"and said Railroad Company shall assume only the valid and outstanding obligations and liability of the debtor or the debtor's trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged." (R. in No. 12,506, p. 50)[3]

The final order in the reorganization proceeding, dated March 28, 1946, provides in part:

"and the Western Pacific Railroad Company is released and discharged forever from all debts and liabilities existing on or before December 28, 1944, whether or not the same have been presented or allowed in these proceedings, and said Reorganized Company is free and clear of all rights, claims, interests, liens, encumbrances, debts, obligations and liabilities, except as otherwise expressly provided in said order." (R. in No. 12,506, p. 2014).

The appellant Corporation was a party to the reorganization proceeding and the orders in that proceeding cancelling the debt upon which appellants now seek to rely have, of course, long since become final. On the most elementary principles of res judicata appellants cannot now re-assert this cancelled debt.[4]

(b) Even if it were appropriate, which it is not, to modify the reorganization decrees in order to revive and reactivate the pre-reorganization debt to appellant Corporation, neither

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[3]The text of this order and of the final order in the reorganization proceeding appears in the record of this Court in case No. 12,506. The Court takes judicial notice of this record. *Latta v. Western Investment Co.,* 173 F.2d 99, 103 (C.A. 9 1949) cert. den. 337 U.S. 940.

[4]*New York v. Irving Trust Co.,* 288 U..S 329 (1933); *Stoll v. Gottlieb,* 305 U.S. 165 (1938); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940).

this Court nor the court below sitting in equity would have jurisdiction to do so. The Bankruptcy Court has exclusive jurisdiction over its decrees.[5]

(c) The effort by appellants to found a claim on the action of this Court in the tax saving litigation is patently frivolous. This Court held in unequivocal fashion that the appellants had no claim.[6]

(d) The judgment in the tax saving litigation that appellants take nothing from appellee is final and on principles of res judicata forecloses this new attempt to recover the same $17,201,739 which appellants claimed in the tax saving case.[7]

(e) The Western Pacific reorganization began in 1935. All pre-reorganization claims against the pre-reorganization The Western Pacific Railroad Company are obviously long since barred by the statute of limitations.[8]

An appeal which presents no substantial question will be dismissed[9] or the judgment below forthwith affirmed.[10] This pro-

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[5]"There is no power in the district court sitting in an independent proceeding in equity to alter, modify or amend bankruptcy orders." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 206 F.2d 495, 499 (C.A. 9 1953)

[6]*Western Pacific R. Corp. v. Western Pacific R. Co.,* 197 F.2d 994, 206 F.2d 495 (C.A. 9 1953).

[7]*Cromwell v. County of Sac,* 94 U.S. 351 (1877); *Northern Pacific Railroad Co. v. Slaght,* 205 U.S. 122 (1907); *Hatchitt v. United States,* 158 F.2d 754 (C.A. 9 1946); *Williamson v. Columbia Gas and Electric Corporation,* 186 F.2d 464 (C.A. 3 1950) cert. den. 341 U.S. 921; *Wilson Cypress Co. v. Atlantic Coastline R. Co.,* 109 F.2d 623 (C.A. 5 1940) cert. den. 310 U.S. 653; *Miller v. National City Bank of New York,* 166 F.2d 723 (C.A. 2 1948).

[8]*California Code of Civil Procedure,* Secs. 337, 339 and 343.

[9]*In re Midland United Co.,* 141 F.2d 692 (C.C.A. 3 1944); *McMillan v. Taylor,* 160 F.2d 217 (D.C. App. 1946); *Wright v. Central National Bank,* 37 F.2d 234 (C.C.A. 10 1929) cert. den. 281 U.S. 755; *Robertson v. Wilkinson,* 10 F.2d 311 (C.C.A. 5 1926); *Dakin v. United States,* 105 F.2d 150 (C.C.A. 4 1939).

[10]*Collins v. Wayland,* 139 F.2d 677 (C.C.A. 9 1944); *Brown v. Carver,* 45 F.2d 673 (C.C.A. 2 1930); *National Surety Company v. Universal Transportation Co.,* 256 Fed. 450 (C.C.A. 2 1919).

cedure is especially appropriate where, as here, a litigant seeks reconsideration of issues already finally decided against him.[11]

2. This Appellate Proceeding Is Contemptuous.

Appellants seek to realize upon an unsecured debt owing from the pre-reorganization The Western Pacific Railroad Company to the appellant Corporation. This debt was determined worthless, cancelled and discharged in the reorganization proceeding and further efforts to realize upon it were enjoined by the final order of the reorganization court, dated March 28, 1946, which said in part:

> "6. All persons * * * are hereby perpetually restrained and enjoined from instituting, prosecuting, or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against The Western Pacific Railroad Company, or against the successors or assigns of said Company * * * on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * *" (R. in No. 12,506, p. 2017)

The court below correctly held that the effort now made to realize on the old debt was a contempt of this order. Appellants continue this effort in this Court and accordingly this appellate proceeding is also in contempt of the reorganization decree. Appellee does not believe this Court should entertain a contemptuous proceeding and on that ground asks that these appeals be dismissed.

3. The Appeal from the Order Granting the Motion for Summary Judgment Should Be Dismissed.

Appellants have appealed from the order of the District Court, dated June 28, 1944, granting appellee's motion for summary

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[11] *Sancho v. Acevedo,* 93 F.2d 331 (C.C.A. 1 1937); *Waddell v. Chicago Land Clearance Commission,* 206 F.2d 748 (C.A. 7 1953).

judgment and denying a similar motion by appellants. This order is interlocutory and non-appealable.[12]

4. The Appeal (No. 14501), from the Order of the District Court Finding Appellants in Contempt of Court and Directing Further District Court Proceedings Should Be Dismissed.

Appellants have appealed (No. 14501) from the June 28, 1954 order of the District Court holding appellants in contempt of the final decree of the reorganization proceeding and directing that further proceedings be held in the District Court to fix the damages suffered by appellee on account of the contempt (R. in No. 14501, pp. 43-45). The proceeding to fix damages has not yet been held. Nevertheless appellants have undertaken to appeal from the contempt order. It is clear that the June 28, 1954 order contemplating, as it does, further proceedings in the District Court is interlocutory in nature and not appealable.[13]

Dated: October 5, 1954.

Respectfully submitted,

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN
Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel

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[12]*Cashion v. Bunn,* 149 F.2d 969 (C.C.A. 9 1945); *United States v. Arizona,* 206 F.2d 159 (C.A. 9 1953); *Morgenstern Chemical Co. v. Schering Corp.,* 181 F.2d 160 (C.A. 3 1950); *John Hancock Mutual Life Ins. Co. v. Kraft,* 200 F.2d 952 (C.A. 2 1953).

[13]*International Silver Co. v. Oneida Community,* 93 F.2d 437, 439 (C.C.A. 2 1937); *Dainese v. Kendall,* 119 U.S. 53 (1896); *McGourkey v. Toledo and Ohio Ry.,* 146 U.S. 536 (1892).

No. 14501

In the

United States Court of Appeals

For the Ninth Circuit

IN RE THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COMPANY,

Appellee.

Notice of Motion to Dismiss the Appeal

To appellants, The Western Pacific Railroad Corporation and Alexis I. duPont Bayard, Receiver, and to Leroy R. Goodrich, Esq., their attorney:

PLEASE TAKE NOTICE that The Western Pacific Railroad Company, the appellee herein, will present to the above entitled court its motion hereinafter set forth to dismiss the appeal herein on Monday, October 18, 1954, at 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, in the courtroom of the above

entitled court in the United States Post Office and Court House Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN

Attorneys for Appellee

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Of Counsel

No. 14501

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IN RE THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DUPONT BAYARD, Receiver,

Appellants,

THE WESTERN PACIFIC RAILROAD COMPANY,

Appellee.

Motion to Dismiss the Appeal

Comes now appellee and moves to dismiss the appeal from the order of the District Court holding appellants in contempt of court and authorizing further District Court proceedings for fixing damages on the ground that:

(a) The order appealed from is an interlocutory non-appealable order.

This motion is based upon the record now on file in this Court and on the foregoing memorandum of points and authorities filed

in support of the motion to dismiss the appeals or affirm the judgment in No. 14515 and in support of this motion.

Dated: October 5, 1954.

ALLAN P. MATTHEW
JAMES D. ADAMS
WALKER W. LOWRY
BURNHAM ENERSEN
ROBERT L. LIPMAN
Attorneys for Appellee

MCCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel